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Reservations to treaties

Note by the Special Rapporteur on draft guideline 3.1.5, "Definition of the object and purpose of the treaty" (tenth report, document A/CN.4/558)

Definition of objections (draft guideline 3.1.5)

1. At the Commission's fifty-seventh session, the Special Rapporteur proposed, in his tenth report on reservations to treaties,[1] draft guideline 3.1.5 concerning the definition of the object and purpose of the treaty, which plays a key role in determining the validity of a reservation. This draft text was worded:

> **3.1.5 Definition of the object and purpose of the treaty**
>
> For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its *raison d'être*.

2. The Commission's consideration of this draft guideline was very brief, owing to a lack of time, and several members were unable to express their views on it during the fifty seventh session (2005). Although most of the members who took the floor did not voice any radical objections to the Special Rapporteur's proposal, several speakers rightly contended that the proposed definition was rather unworkable and of no obvious usefulness.[2]

3. In the Sixth Committee, the draft text proposed by the Special Rapporteur was, on the whole, well received by Member States, and some intimated that the Commission should pursue its consideration thereof.[3] The comment was also made,

[1] A/CN.4/558 and Add.1 and 2.

[2] Mr. Gaja (A/CN.4/SR.2857, p. 16), Ms. Escarameia (A/CN.4/SR.2858, p. 3), Mr. Koskienniemi (ibid., p. 6), Mr. Fomba (ibid., p. 13), Mr. Economides (ibid., p. 21), Ms. Xue (ibid., p. 25) and Mr. Rodríguez Cedeño (ibid., p. 29).

[3] Russian Federation (A/C.6/60/SR.16, para. 18), Mexico (A/C.6/60/SR.15, para. 5) and Argentina (A/C.6/60/SR.13, para. 103).

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however, that the definition was of scant use because it was couched in vague terms providing little clarification.[4]

4. Although some Commission members[5] and a few delegations in the Sixth Committee[6] may have demurred, the Special Rapporteur still believes[7] that the Guide to Practice must of necessity contain a definition of the object and purpose of the treaty. Apparent difficulty with its formulation should not be a reason for foregoing definition of a notion central to the law of reservations and, what is more, to the law of treaties as a whole. Moreover, it must be borne in mind that the purpose of the Guide to Practice is to elucidate and clarify the rules governing reservations to treaties established by the two Vienna Conventions on the law of treaties.[8] In the opinion of the Special Rapporteur, not to define a notion that is so enigmatic yet, at the same time, so central to the assessment of a reservation's validity would leave a major gap in the Guide, which would defeat its purpose of assisting States in their practice with regard to reservations.

5. It is, however, indisputable that the object and purpose of a given treaty can be determined only by reference to the text and particular nature of each treaty. Yet while there is no such thing as a "one-size-fits-all" definition and it is inevitable that some degree of subjectivity will persist in each individual case, it is possible to limit the latter's effect. As the Special Rapporteur emphasized in his tenth report, guidelines on the definition of the object and purpose of the treaty "will, to be sure, not resolve all problems", but "they can certainly contribute to a solution if they are applied in good faith and with a little common sense, and it would appear to be legitimate to transpose the principles in articles 31 and 32 of the Vienna Conventions and adapt them to the determination of the object and purpose of a treaty".[9]

6. Having carefully listened to the Commission members who expressed an opinion on this point and having studied the comments of delegations in the Sixth Committee, the Special Rapporteur has come to the conclusion that the definition currently proposed in draft guideline 3.1.5 falls somewhat short of the clarification which he deems essential, and that the bald reference to the *raison d'être* of the treaty is likely to replace one enigma[10] with another.

7. Following up a suggestion made at the fifty-seventh session,[11] the Special Rapporteur considers that it might be advisable to take as a model the wording

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[4] Sweden (A/C.6/60/SR.14, para. 21) and China (A/C.6/60/SR.15, para. 19).

[5] Mr. Gaja (A/CN.4/SR.2857, p. 18) and Mr. Koskienniemi (A/CN.4/SR.2858, p. 7).

[6] United Kingdom (A/C.6/60/SR.14, para. 5), New Zealand (ibid., para. 45) and Guatemala (ibid., para. 65).

[7] See also the conclusions of the Special Rapporteur during the deliberations of the fifty-seventh session, A/CN.4/SR.2859, p. 10: "[I]t was essential to try to define the concept of object and purpose, since it was fundamental to the law of reservations and to the law of treaties in general".

[8] See also the comments of the Russian delegation to the Sixth Committee, A/C.6/60/SR.16, para. 18: "It might be difficult to define a treaty's object and purposes in an accurate or objective manner, but such a definition might be a useful guideline for the purpose of interpreting a specific international treaty in conjunction with the reservations made thereto".

[9] A/CN.4/558/Add.1, para. 91.

[10] See Isabelle Buffard and Karl Zemanek, "The 'object and purpose' of a treaty: an enigma?" *Austrian Review of International and European Law* (A.R.I.E.L.) 1998, pp. 311-342.

[11] Mr. Gaja (A/CN.4/SR.2857, p. 16).

found in the second part of draft guideline 3.1.12 ("Reservations to general human rights treaties")[12] and to link the reservation to the impact it will have (or is intended to have) on the general architecture of the treaty. With this in mind, the following definition could be adopted as a basis for the work of the Drafting Committee:

3.1.5 Definition of the object and purpose of the treaty

For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential rules, rights and obligations indispensable to the general architecture of the treaty, which constitute the *raison d'être* thereof and whose modification or exclusion could seriously disturb the balance of the treaty.

8. Alternatively, along the same line of thought, the following definition could be adopted. It differs from the previous one in that it places greater emphasis on the procedural angle:

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation shall be incompatible with the object and purpose of the treaty if it has a serious impact on the essential rules, rights or obligations indispensable to the general architecture of the treaty, thereby depriving it of its *raison d'être*.

9. These alternative texts[13] might seem more workable than the wording proposed last year, since they preserve a vital degree of flexibility while ultimately leaving something to the subjective assessment of the interpreter. Furthermore, they make it clear that, although the notion of the object and purpose of the treaty is, in the Special Rapporteur's view, identical in the various provisions of the Vienna Conventions that contain a reference to it,[14] the two texts plainly indicate that they are supposed to apply only to the issue of the validity of reservations.

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[12] "To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it."

[13] The Special Rapporteur has a definite preference for the first set, which he thinks is more consonant with the general spirit of the definitions adopted thus far in the Guide to Practice.

[14] See the tenth report on reservations to treaties, A/CN.4/558/Add.1, paras. 77-78.